

Material Supranationalism in the European Law

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1. The Concept, Main Features and Types of Supranationalism

The two World Wars have driven Europe to the conclusion that integration was the necessary precondition for peace. This is the period of origin of the very first ideas of the ideologists of Common Europe; in particular, the commencement of the construction of a united, democratic and economically strong Europe instead of the one of previous wars and Nazis governance. For the attainment of the identified goals, it was necessary to ensure the consolidation of the European countries around common interests which necessitated the creation of an international organisation of a special type which would have been delegated with discretionary powers. Such kinds of supranational organisations were the European Communities which were created at the initial stage of European integration.¹ The term 'supranational' comes from the Latin words *supra* (more, above, high) and *natio* (nation, people) and means something extending beyond the boundaries of a separate nation or state.

Supranationalism is also an international legal concept which is mainly used for characterising the European Union and the European Communities. The concept implies the delegation of competences from state to suprastate level. Its particular feature is that "the organisations, which are of a supranational nature, dominate over their members states."²

The following comprise the supranational features of the European Communities:

1. Delegation of certain sovereign powers to the Community by the Member States,
2. Supremacy of the Community Law over the domestic laws of the Member States,
3. Direct effect and application (by domestic authorities) of the Community Law,
4. Independent institutions (first of all the European Commission and the European Court of Justice),

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¹ 1. The European Coal and Steel Community (ECSC). The Treaty establishing the ECSC was signed on 18 April 1951 and entered into force on 23 August 1952. The Treaty was made for a term of fifty years and, consequently, on 23 August 2002, the ECSC ceased to exist; 2. The European Economic Community (EEC). The Treaty establishing the EEC was signed on 25 March 1957 and entered into force on 1 January 1958. By virtue of the Maastricht Treaty of 1992, the name of the European Economic Community was changed into the "European Community"; 3. The European Atomic Energy Community (Euratom). The Treaty establishing the Euratom was signed on 25 March 1957 and entered into force on 1 January 1958. The initial members of all three Communities were: Germany, France, Italy, the Netherlands, Belgium and Luxembourg.

² Schwantes, Die Supranationalität, Eine Untersuchung internationaler wirtschaftlicher Organisationen Europas im 19. und 20. Jahrhundert, Inaugural-Dissertation zur Erlangung der Doktorwürde einer Hohen Rechtswissenschaftlichen Fakultät der Universität Köln (Tag der mündlichen Prüfung: 15 Mai 1962), 5.

5. Particular importance of the European Court of Justice (the binding nature of its judgements and their enforcement), and
6. Financial autonomy of the European Communities.

It must be mentioned that the other organisations also have some supranational features, however the main difference of the European Community from the other traditional international organisations is the particularly large number of supranational features embodied in this organisation.

There is a difference between decisional (institutional) and normative supranationalism. Decisional supranationalism refers to the subordination of Member States to the supranational nature and structure of the decision-making policy of the organisation (making decisions at the Council of Europe by the majority of votes, division of lawmaking functions between the European Parliament and the European Commission) whilst the normative supranationalism implies the particular strength of the Community Law which is created during the supranational process of decision making.³

2. Material Supranationalism and its Particulars

The elements of material supranationalism are: the direct effect of Community law in Member States and its supremacy over domestic legislation.

3. Direct Effect of Community Law

3.1 Concept of Direct Effect of Community law

Many difficulties emerge when the rules of one legal system are operating and being applied within another. This is the situation in the case of the interrelationship between international and national European Community law and domestic laws.⁴

When analysing the rules of European Community law, it is easily understandable that they are based on those common principles which are particular to the rules of law; that is, they also need to be enforced in order to become operable. On the grounds of their effect, they may be used for the settlement of specific issues.

The German literature on European law often employs the term '*Durchgriffswirkung*' (through effect) which means that the provisions of Community law create rules which have a direct effect in the Member States without being implemented in domestic law. The direct effect of Community law means that along with its institutions and Member States, it directly delegates rights and obligations to individual persons as well.

³ Schütz/Bruha/König, 2005, 67.

⁴ Klein, Unmittelbare Geltung, Anwendbarkeit und Wirkung von Europäischen gemeinschaftsrecht, Ress/Will (Hrsg.), Reden und Berichte aus dem Europa-Institut, Nr. 119, 1988, 9.

One of the arguments supporting the idea that the Treaty Establishing the European Communities created the independent legal order and that its feature of being distinctive from international law is the direct effect of the provisions of Community Law in the Member States. Although the phenomenon of the direct effect of law is familiar for international law as well, their basic subjects are states, rather, and not individuals.⁵

The initial function of the direct effect doctrine must be understood to be the overcoming of the mediation of an individual, which is particular for classic international law, and which aims to present an individual as a subject.⁶

The direct effect of Community Law is its essential feature manifesting the intensity and depth of European integration. Whilst the role of the Member States in the European Council is still measurable in the course of the development of Community Law, the direct effect ensures the flawless normative effect of the provisions of Community law without “domestic filters.”⁷

As previously mentioned, the principle of direct effect is particular for the provisions of Community law whilst the pieces of law, adopted in the field falling within the second and third pillars⁸ of the European Union, do not have the so-called ‘through effect’ and, hence, are legally binding only for the state concerned.

3.2 Direct Effect of Community Law according to the Judicial Practice of the Communities

An introduction of the principle of direct effect of Community law, despite the initial opposition of the Member States, was one of the most courageous steps of the European Court of Justice. The starting point of the judicial practice related to this issue was the well-known and innovative judgement of the European Court of Justice on *van Gend & Loos/Niederlaendische Finanzverwaltung* case wherein the court considered that: “The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community law not only imposes

⁵ There are agreements, for example, which regulate private law relations and, consequently, in this case both the state and private law subject may become their subjects. The apparent example of the unification of International Law is the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), the first three Chapters of which regulate private law relations and have direct *per se* effect in the Member States.

⁶ *Nettesheim in Grabitz/Hilf*, Das Recht der Europäischen Union, Kommentar der EG/EUV, Band III, EUV/EGV29 Ergänzungslieferung-Stand Dezember 2005, Art. 249, Rn. 34.

⁷ *Nicolaysen*, Europarecht I, Die Europäische Integrationsverfassung, 84.

⁸ Currently, the so-called three-pillar construction of the European Union is being employed. The first pillar covers the European Community and Euratom, the Second Pillar – Common Foreign and Security Policy, and the third pillar – Police and Judicial Co-operation in Criminal Matters.

obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the community.”⁹

The European Court of Justice continued developing this idea in its following decisions with one exception; that is, it used the term “independent legal order” instead of “new legal order of international law.” Unlike the traditional international law agreements, the Treaty Establishing the European Economic Community created the new system which, upon its coming into force, was adopted by the legal orders of the Member States and which must be used by the national courts.¹⁰

The European Court of Justice brings forward the following argument to prove the direct effect: the Treaty establishing the European Economic Community acknowledged individuals as subjects. At the same time, the aforementioned is supplemented by a functional argument as well according to which the principle of direct effect enables the Treaty to make every citizen, who is interested in the protection of his/her interest, the defender of the Community law, who secure its efficient application in Member States.¹¹

In its judgement delivered with respect to the case *Finanzverwaltung/Simmenthal*, the European Court of Justice presented direct effect as the means for ensuring the principle of uniform and full effect of Community Law. Based on this principle and following their enactment, the provisions of Community law are required to secure the uniform and full effect in all the Member States throughout the whole period of their validity.

3.3 Direct Effect as the Feature of Community Law Provided by the Treaty Establishing the European Community

Direct effect is the only feature, particular to Community law, which is mentioned in the Treaty itself. Article 249 of the Treaty Establishing the European Community, for example, says that “A regulation¹² shall... be... directly applicable in all Member States”¹³ which means that it has a direct effect without being implemented in domestic legislation. This provision contradicts the traditional understanding of an interrelation between international and domestic law according to which, in order for a provision of international law to have legal consequences, it must be incorporated into the domestic legal order.

⁹ EuGH Slg. 1963, 1.

¹⁰ EuGH Slg. 1964, 1251.

¹¹ *Schroeder in Streinz*, EUV/ EGV Kommentar, Band 57, 2005, 2166, Rn. 37.

¹² A legal act of the Community, which is directly applicable in all the Member States and is binding in its entirety.

¹³ EGV, Art. 249.

3.4 Necessary Criteria for the Direct Effect

In order for a provision of the Community law to have the direct effect it must meet the following criteria:

1. The provision must be sufficiently clear and precisely stated (as concerns the subject of regulation, questions to be asked include What is being regulated? Who is entitled and who bears the responsibility as concerns the circle of addressees?),
2. It must be unconditional or non-dependent (as concerns the expiry or non-existence of a time period or inadmissibility to change any clause of condition) and
3. The provision must contain a claim which can be fulfilled without a domestic implementation act.

Following the establishment of the compliance with the aforementioned principles, the European Court of Justice has considered many of the provisions of the Treaty Establishing the European Community as having direct effect in its wider practice. Prohibition of discrimination, provided for by Article 12 – as well as the articles related to the freedom of movement of goods, freedom of establishment and entrepreneurial activities, prohibition of duties and rules on competition – may serve as the examples of the aforementioned. The European Court of Justice (*Molkerei-Zentrale, Rs.28/67, Slg., 1968*) explained the prohibition of discrimination in taxation, contained in Article 90, as a provision of direct effect as follows: “Commensurate with the basic principles and goals of the agreement it serves, these provisions are an integral part of the domestic legal order without the other domestic measures.” These types of provisions are the direct source of rights and obligations for all citizens with each national court, as the authority of a Member State, aiming at the safeguarding of rights granted to everyone by the Community law within its term of reference.

3.5 Objective and Subjective Effect of Community Law

A difference is made between the objective and subjective effect of Community law. The objective effect means that a right is acquired by or the obligation is imposed upon a subject having state powers whilst in the case of the subjective effect, the subject of rights and obligations is an individual. The direct effect of Community law, then, may apply both to the relationship between the individual and the state (vertical relationship) and between the natural persons (horizontal relationship).

An extension of the principle of the direct effect to a private law relationship is the most apparent manifestation of normative supranationalism.¹⁴ In the opinion of the Community law, prohibition of differentiated treatment, according to belonging to a state, applies not only to the acts of state authorities but also to such measures which contain specific regulations in the field of labour and services. The freedom of movement of persons and

¹⁴ Schütz/Bruha/König, 78.

services, for example, would have been violated had the private law unions or other persons put up such obstacles due to their legal autonomy.¹⁵

3.6 Direct Effect of the Directives

A directive is a legal act of the community “addressed only to the states.”¹⁶ It is legally binding within the scope of the goal to be attained and grants domestic authorities the freedom of choice as concerns the form and means of implementation.

Inasmuch as the addressees of the Directives, under Article 249 of the Treaty Establishing the European Community, are only the states, they may not have a direct effect in the Members States.

The European Court of Justice allowed for the exemption, under which the Directives may have direct effect, when there are certain preconditions thereof provided it has not been implemented within time frames specified therein.¹⁷

The necessary precondition for a Directive to have a direct effect is that it must meet the criteria which are set generally for the direct effect of the other provisions of Community law. As previously mentioned, the Directives are addressed only to the states which are required to implement them into the domestic legislation. The effect of this act of the Community law, however, has its own peculiarities. In particular, they do not directly confer rights upon individuals nor impose obligations which mean that they “cannot apply direct effect to the relationship between the natural persons”¹⁸ (denial of the horizontal effect). When a state violates its obligations and fails to achieve a timely implementation of the Directives, it should not be entitled to benefits from its action and to apply the Directives against individuals in specific relations. The European Court of Justice has taken up this trend and acknowledges the rights of an individual in the disputes with the States (vertical effect for the benefit of an individual). Unlike Directives, regulations have both an objective and subjective effect.

3.7 Consequences of Direct Effect

The main consequences of direct effect of Community law in the Member States is the entitlement of an individual to recourse to these provisions in the court and the obligation of national courts not to apply the provisions of the national law conflicting with the Community law.¹⁹

¹⁵ EuGH Slg.1974, 1405, 1419 f.

¹⁶ EGV, Art. 249.

¹⁷ EuGH Slg 1970, 825, 838; 1974, 1337, 1348 f.; 1979, 1629, 1641 f; 1982, 53, 70 f.; 1987, 1453, 1466.

¹⁸ EuGH Slg.1986, 723.

¹⁹ EuGH Slg. 1978, 629.

4. Supremacy of Community Law

4.1 Concept of the Supremacy of Community law

There are frequent conflicts with domestic laws due to the direct effect of Community law. In cases when similar relations are regulated by two different provisions, it is necessary to identify which of them is to prevail and, consequently, on the basis of which provision the dispute concerned is to be settled. Since 1963, the European Court of Justice has introduced an innovative practice under which the legal system of the European Communities has uniform and direct effect and, at the same time, enjoys supremacy over domestic legislation.

Rome Treaties²⁰ do not directly regulate the problem of supremacy of their provisions as compared with the national law which initially incited fierce debates concerning the supremacy of Community law over domestic law. Currently, this problem can be regarded as exhausted based on the practice of the European Court of Justice as the claim on the supremacy was commonly acknowledged.

The “European” solution of the problem of supremacy was the development of the fundamental doctrine that stated that Community law was an independent legal system and which enjoyed autonomous powers of the Community.²¹ In other words, Community law was independent from the Member States and was derived based on special provisions. This idea was also embodied in the judgement on the *Costa/E.N.E.L* case: In contrast to the other traditional international law treaties, the Treaty Establishing the European Communities created its own legal system which, upon its adoption, was acknowledged by the legal systems of the Member States and must be applied by national courts.²²

Article 249 of the Treaty Establishing the European Communities may also be regarded as the acknowledgement of the supremacy of Community law. Under this article, a Regulation “shall be binding in its entirety” and shall be “directly applicable in all Member States”. These provisions would have been meaningless had the legal acts of the Member States prevailed and which would have also had a negative impact on legal integration.

²⁰ The Treaties establishing the European Economic Community and Euratom were signed in Rome on 25 March 1957 and entered into force on 1 January 1958.

²¹ *Oppermann*, *Europarecht* 3, 2005, 182, Rn. 2.

²² EuGH, Slg. 1964, 1251.

4.2 Extent of the Supremacy of Community law

All the sources of Community law,²³ including the provisions of secondary legislation, shall take priority.²⁴

The problem of extent is rather problematic in the definition of supremacy. A question arises, then, about whether or not it applies only to the ordinary laws or if this doctrine may be also applied with respect to the provisions of the Constitution. The European Court of Justice found a solution based on common European interests and stated that Community law enjoys supremacy over all the national laws including the Constitution and basic rights.²⁵ Whenever the provisions of national law, which are in conflict with the Community law, are given priority, this may be identified with the refusal to discharge obligations which are to be undertaken by the Member State. Furthermore, the existence of the fundamentals and basic principles of the Community will be seriously doubted. This does not mean, however, that the basic constitutional principles and, particularly, the basic rights must be neglected in Community proceedings.²⁶

The principle which is common for federal states, under which the federation is to act in the interests of the lands and vice versa – whilst at the same time being benevolent to each other – must be *mutatis mutandis* transposed into Community law even though the latter is not a federation. The national Constitutions must be interpreted in benevolence to the Community provisions and vice versa.

4.3 Supremacy of Community Law According to the Judicial Practice of the Member States

Initially, the national courts found it difficult to integrate the doctrine on supremacy of the Community law into the national legal systems. In the course of time, however, this problem has come to be settled.

The interrelation between Community law and national law is a rather difficult problem according to the German example which was, to some extent, promoted by the non-uniform practice of the Constitutional Court of Germany. The Constitutional Court fluctuated between its readiness to acknowledge the independence of the Community

²³ In the sources of European Community law, the difference is made between the Primary and Derived law. The Primary law includes the provisions which established the Communities and, subsequently, the European Union, and which make the legal basis and framework for the activities of the institutions of the Communities (establishing Treaties, Protocols, Charters of the Institutions, General Principles, Habits). The Derived (secondary) law refers to the legal provisions adopted by the institutions of the European Communities (Regulations, Directives, Resolutions, Recommendations, Opinions).

²⁴ Schroeder in *Streinz*, Art. 249, 2169, Rn. 44.

²⁵ EuGH Rs Slg 1970, 1125 ff.

²⁶ *Schmidt in von der Groeben/Schwarze*, Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft, Band 4, Art. 189-314, EGV Art.249, 770, Rn. 3.

law and an international law approach which was to ensure the “dominance of the states of the treaties”.²⁷ By the end of the 1960s, the Constitutional Court acknowledged that Community law was the autonomous legal system.

Unlike the interrelation between the ordinary laws and the Community law (which is less problematic inasmuch as the Constitutional Court of Germany acknowledges the prevalence of the provisions of the Community law), the interrelation with constitutional law is much more difficult. In its decision of 1974 on the so-called *Solange I* case, the Constitutional Court of Germany stated that as long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law (the Constitution of Germany), the submission of the case to the Federal Constitutional Court for a decision is permitted and required. This follows, then, a consideration based on merits²⁸ at the European Court of Justice when it does not admit the provision interpreted by the European Court of Justice as applicable due to its conflict with the basic rights.²⁹ Pursuant to this decision, the provisions of the Constitution take priority over those of the Community law. The judges considered that, although the German Basic Law permitted the transfer of sovereign powers to intergovernmental institutions, it did not allow for the change of the basic structure of the Constitution without amending the Constitution; namely, by legal acts of the international organisation. The part of the Constitution related to basic rights falls within the main structure of the basic law and, as long as the protection of human rights at the Community law level is not adequately in line with that of the Constitution, the national institutions and the courts would not have applied the provisions of the Community law.

It should be emphasised that this decision was not a unanimous one due to the dissenting opinion of three judges. They stated that the Constitutional Court was not entitled to verify the compatibility of the Basic Law with the Community secondary legislation – which was excluded by the fact that as long as Germany delegated the sovereign rights to the Community in certain fields, it also had to acknowledge the law of such institutions – on the grounds of which its subordination to national review would not have been admissible. The group of judges, having a dissenting opinion, considered that the provisions of Community law took priority over national law, which was true not only with the ordinary law, but with the basic rights as well as guaranteed by the Constitution.

This decision was strongly criticised and its impact was felt, as well, to a certain extent on the so-called *Solange II* decision. Under this decision, as long as the European Communities ensure a general and effective protection of fundamental rights – which is to be regarded as

²⁷ *Oppermann*, 183, Rn. 6.

²⁸ One of the types of proceedings in the European Court of Justice, within which in the case of a doubt in the interpretation of the Community law, the national court is entitled to address the European Court of Justice with its questions whilst the court of highest instance is required to address the European Court of Justice in the case of some doubt.

²⁹ BVerfGE 37, 271.

substantially similar to the protection of fundamental rights required unconditionally by the Constitution – the Federal Constitutional Court will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law.³⁰ This decision, in fact, acknowledged the supremacy of Community law over the domestic legislation.

The so-called Maastricht Decision, *Maastricht Entscheidung*, is regarded as a step backward as compared with *Solange II* in the light of the acknowledgement of the supremacy of Community law.³¹ This decision admits the possibility of the review of the acts of the Community institutions with a view to their compatibility with the Constitution.

The regulation of the problem of supremacy of Community law more or less differs from Member State to Member State. The Greek Constitution, for example, provides for the supremacy of Community law only with respect to ordinary laws whilst Community law, “according to dominating opinion, has no prevalence over the Constitutional law.”³²

In the Netherlands and Ireland, the supremacy of Community law is regulated by the Constitution. In the Netherlands, for example, the doctrine on supremacy is less problematic inasmuch as Article 94 of the Constitution directly states that statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of the resolutions by international institutions. In the other States, the reinforcement and the development of the doctrine on the supremacy of Community law mainly accounts for judicial practice “which not only acknowledges” the uniform effect of the European Union Law but also promotes the reinforcement of the European Union as a legal community.”³³

In France, the *Conseil d’Etat* acknowledged the supremacy of Community law in many of its decisions.³⁴

In Italy, the supremacy of the Community law with respect to domestic legislation is related to certain specific problems. In its decision of 27 December 1973, the Constitutional Court accepted the autonomy of Community law (ordinary laws, but not the Constitution) and its supremacy with respect to Italian law.

According to the practice of Belgian courts, the Treaties Establishing the European Communities developed a new legal order for the benefit of which the state have limited their sovereign rights in certain fields and which proves the supremacy of Community law as it has a direct effect with respect to domestic legislation.³⁵

³⁰ BVerfGE 73, 39.

³¹ BVerfGE 89, 155.

³² Grabenwarter, “Staatliches Unionsverfassungsrecht” in Europäisches Verfassungsrecht, Theoretische und dogmatische Grundlagen, 2003, 294.

³³ Nettesheim in Grabitz/Hilf, EGV Art. 249, 20, Rn. 43.

³⁴ Nicolaysen, 97.

³⁵ Umbrach/Clemens (Hrsg.), Grundgesetz Mitarbeiterkommentar, Art. 1-37, 2000, Art. 24.

4.4 Consequences of the Supremacy of Community law

The legal consequence of the supremacy of Community law is that the provisions of domestic legislation do not apply in the case of the conflict of laws. National provisions, which are not compatible with the Community law, are also acknowledged as invalid.³⁶ The European Court of Justice speaks about the inapplicability of national provisions³⁷ whilst the Federal Constitutional Court and Supreme Administrative Court of Germany speak about the priority of application of the European law without mention of the invalidity of the national provisions. A Community Member State is required, at least in part, to amend the inapplicable provisions which, in many cases, would not have become necessary had Community law left the national law idle.³⁸ Particular attention was accorded to the phrase according to which priority “hinders the essential implementation of the comparatively new legal acts.”³⁹ In fact, this phrase gave birth to the theory of a “blocking effect” (*Sperwirkung*) of Community law under which it shall be inadmissible for a Member State to adopt the legal acts which are in conflict with Community law. The development of the theory of a blocking effect is promoted by the national courts as, for example, the decision of 27 May 1971 in which the Belgian *Cour de Cassation* considered that the provisions of Community law took priority over domestic provisions which were adopted later than the Community provisions. Consequently, the lawmaker is to refrain from making laws which are in conflict with the European provisions.

5. Conclusion

Although the Member States have delegated part of their sovereignty to the Community with a view to building common Europe, it will become more and more difficult for them to regulate certain problems according to common European interests with the passage of time.

Based on the study of the elements of material supranationalism, it can be freely asserted that their main purpose is ensuring the legal integration through the reinforcement of the uniform effect of the Community law in the Community Member States. The existence of uniform law, together with the economic and cultural components, is the necessary precondition for the ideas of a common Europe to come true.

The direct effect of Community law and its supremacy over the domestic legislation is widely acknowledged, however it must be mentioned that the problems and dissenting opinions in different legal systems are still numerous.

³⁶ *Wegener* in *Calliess/Ruffert*, Kommentar des Vertrages über die Europäische Union und des Vertrages zur Gründung der Europäischen Gemeinschaft, 2002, Art. 220, EGV 1996, Rn. 23.

³⁷ EuGH Slg. 1991, 297, 321.

³⁸ *Jaras*, 3.

³⁹ EuGH Slg. 1978, 629.